IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1388

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

vs.

CHARLES F. WHITE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. respectfully moves this Court leave to file a brief, *amicus curiae,* in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amicus curiae* and our reasons for desiring to file are set forth below.

INTEREST OF AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its bylaws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal law.

In the furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

This case, involving as it does both questions of search and seizure and the law of confessions and admissions, will have a major impact on police investigative techniques in the future. Additionally, this case presents a vehicle for this Court to consider the effect of the obvious good faith of the law enforcement officers involved in the case.

Accordingly, *amicus* respectfully moves this Court for leave to file our brief.

Respectfully submitted,

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ARGUMENT.

I. Minor Judgmental Errors, Made by Police Officers Who Were Acting in Good Faith, Should Not Require Suppression of the Relevant and Probative Evidence of Guilt.

Amicus will not reiterate the legal arguments made by the Commonwealth of Massachusetts in the instant case, although we agree with them and wish to associate ourselves with them. We will confine our argument to the pragmatic issue of whether justice is served by suppressing relative and probative evidence of guilt when the law enforcement officers involved, acting in good faith, commit minor errors of judgment, particularly when

suppression would have little or no deterrent effect upon future police conduct.

The instant case is yet another in a line of cases in which this Court is called upon to review the constitutionality of police conduct which the lower courts have found to violate a given defendant's rights through rigid and inflexible application of the doctrines enunciated in *Mapp* v. *Ohio*, 367 U. S. 643 (1961) and *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

This case differs from many others, however, in that *both* the exclusionary rule of search and seizure and the *Miranda* rule of suppression of confessions are involved, the one following from the other. If the defendant's statement to the state police trooper that there was marijuana in his car had not been barred because of the *Miranda* violation, then certainly the search warrant for the car which the trooper procured, based on those statements, would have been valid. Thus the lower court appended one suppression doctrine to another in order to reach its conclusion, and minor judgmental errors by police officers who were demonstrably acting in good faith became the basis for the suppression of probative and reliable evidence of guilt.

We believe that a sounder approach to such situations was enunciated by this Court in *Michigan* v. *Tucker*, 417 U. S. 433 (1974):

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose. At 446.

We submit that it is in the context of just such a realistic and balanced approach that the facts and circumstances of the instant case should be judged.

The record demonstrates that the law enforcement officers involved in this case were acting in good faith in their arrest and

handling of the defendant White. He was advised of his *Miranda* rights on three occasions: at the scene of his arrest for drunken driving, upon his arrival at the state police barracks, and at the time that the marijuana was discovered on his person. All of this indicates an effort by the police to comply with White's Fifth Amendment rights.

Likewise, the police were obviously not intent on violating White's Fourth Amendment rights. The State Trooper, after being told by White that there was marijuana in the car, ceased questioning him further and took the most prudent search and seizure course: he procured a search warrant for White's automobile.

Thus, it seems clear that rather than having any intention to *violate* the Fourth and Fifth Amendment rights of Respondent White, the law enforcement officers were observing these rights as scrupulously as they knew how.

In the language from *Michigan* v. *Tucker* cited above at 446, it is stated that it would be unrealistic to require that the police make no errors whatsoever. Yet, the lower court ordered the suppression of the marijuana seized from the car based on two "errors" which it had found the police had made.

First, the officers involved were not able to predict that the trial court would "second guess" them as to the defendant's condition of intoxication; nor that the Supreme Judicial Court of Massachusetts would uphold the trial court by ruling that White was in too drunken a condition to make a knowing waiver of his *Miranda* rights. This fact is underscored by the fact that the state Supreme Court found the facts in the instant case to be "not so compelling" as in an earlier case in which that court had held invalid a purported waiver by a drunken, highly agitated rape suspect.[1] In other words, the condition of intoxication of defendant White was below the threshold previously set by the Supreme Judicial Court of Massachusetts for determining whether a waiver was valid or invalid depending upon a given suspect's degree of intoxication.

1. *Commonwealth* v. *Hosey*, 334 N. E. 2d 44 (Mass. 1975).

The second "error" occurred when the state trooper, who was searching White prior to putting him in the lock-up, found a marijuana cigarette in his shirt pocket, readvised him of his *Miranda* rights and then asked him if he had more marijuana on his person or in his car. White replied that he did have some marijuana in his car and that he could name them some "biggies."[2]

This, the lower court held, violated the defendant's rights because he had unsuccessfully attempted to call an attorney and had done nothing to indicate that he had changed his mind about wanting a lawyer.

There is nothing in this transaction to indicate that the trooper acted in an oppressive manner. In fact, the third *Miranda* warning, after the finding of the cigarette, the trooper's desire not to discuss the matter further with White, and the fact that the trooper procured a search warrant, indicate that he was still being observant of the defendant's rights. At worst, the single question asked by the trooper was a judgmental error.

When the circumstances in this case are viewed in their entirety, we submit that the "errors" of the policemen, in the context of their otherwise scrupulous observation of the defendant's rights, should not require the suppression of the evidence either on Fourth *or* Fifth Amendment bases.

The lower court applied a rigid and technical interpretation to the questions involved, holding the *Miranda* requirements and the resulting "fruit of the poisonous tree" doctrine to be absolute. This Court, on the other hand, has, in recent years, taught that there must be some flexibility in the balance between the rights of the accused and the needs of law enforcement. This balancing test has been applied in Fifth Amendment cases in which this Court has weighed the requirements of the *Miranda* decision against the realities of the criminal law enforcement process.

2. This statement about "biggies" casts doubt on the lower court's holding that White was too drunk to waive his rights. At least he was lucid enough to realize that he was in trouble and that he might be able to "buy his way out" by turning informant.

For example, statements taken in violation of *Miranda* may nevertheless be used by the prosecution to impeach the testimony of a criminal defendant who takes the witness stand at trial, *Harris* v. *New York*, 401 U. S. 222 (1971); an adverse witness could testify against the defendant even though his existence had been discovered through statements taken from a defendant who had not been advised of his *Miranda* rights, *Michigan* v. *Tucker*, *supra;* or, renewed questioning of a suspect, who had invoked his privilege not to answer questions, at a later time and about a different crime, did not violate *Miranda*, *Michigan* v. *Mosley*, 423 U. S. 96 (1975).

Likewise, this Court has, in recent years, demonstrated a flexible approach to the application of the exclusionary rule. For example, illegally seized evidence may be used in grand jury proceedings, *U. S.* v. *Calandra*, 414 U. S. 338 (1974); illegally seized evidence may be used in civil proceedings, *U. S.* v. *Janis*, 428 U. S. 433 (1976); living witness testimony which was a fruit of an illegal search may be used to obtain a perjury conviction, *U. S.* v. *Ceccolini*, ____ U. S. ____, 22 Cr. L. 3510 (1978).

There is, then, according to the teachings of this Court, a flexibility in the law of criminal procedure based upon the need for a balance between the rights of society and the rights of the accused. In cases such as this one, in which the good faith of the police can be demonstrated and in which such errors as they might have made are minor, we submit that the balancing test should be resolved in favor of the needs of effective law enforcement and against the suppression of the truth.

This Court in *Michigan* v. *Tucker*, *supra*, not only dealt with the fact that policemen will of necessity make errors, but further concluded that:

> Before we penalize police error, therefore, *we must consider whether the sanction serves a valid and useful purpose. Supra*, at 446. (Emphasis supplied.)

In the facts and circumstances of the instant case, because the law enforcement officers were acting in good faith, the "sanction" (*i.e.*, suppression) will serve no "useful and valid purpose" (*i.e.*, deterrence of future police misconduct). An officer who acts in good faith because he believes that his actions are reasonable will not be deterred in future cases because that is how a reasonable man would have acted.

Mr. Justice White, dissenting in *Stone* v. *Powell*, 428 U. S. 465 (1976), underscored this point:

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted. At 541.

The instant case, then, contains three crucial elements: (1) good faith activity on the part of the police; (2) minor judgmental errors which were "second guessed" by the lower courts; and (3) little likelihood of future deterrence. This is, as we have noted, precisely the kind of case in which the balance between the conflicting interests should be resolved in favor of the needs of law enforcement.

CONCLUSION.

The suppression of the evidence in this case came as a result of minor errors in judgment made by police officers who were acting in good faith. The facts of the case make it apparent that little as a deterrent to future police "misconduct" would result if this Court upholds the suppression of evidence. For these reasons, we respectfully urge this Court to reverse the judgment of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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